**International Brotherhood of Electrical Workers, Local Union No. 1547, AFL–CIO (Redi Electric, Inc.) *and* Rick Torres.** Case 19–CB–6536

October 31, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On March 12, 1990, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the complaint be dismissed.

MEMBER OVIATT, concurring in part and dissenting in part.

I concur with my colleagues in dismissing the complaint allegations as to the Union's action in connection with the internal union charges filed against Torres by DePeal. Torres was not employed by Redi Electric at the time he made his comments to Richard Warner of Anchorage's Municipal Light and Power Company (with whom Torres had worked closely for several years) regarding DePeal's presence at the Union's office earlier that day. Indeed Torres' remarks were extraneous to any employment relationship he had with anyone. In these circumstances, I agree that there was no violation in the Union's actions.

I do not agree, however, with dismissal of the allegations concerning the Union's conduct on the charges filed against Torres by George Sloane and Harry Warner. The Union ''knew or should have known'' that Torres was a statutory supervisor for Redi Electric at the time it proceeded on the internal charge filed by Sloane in early May 1989.[1] Sloane's charge on its face asserted that Torres had discharged Sloane, and any diligent inquiry by the Union at that time would have revealed that Torres was then acting as a statutory supervisor. Thus, there should have been no trial at all, and the postponing and rescheduling of the proceedings for approximately 4-1/2 months was precisely the type of harassment that Section 8(b)(1)(B) was intended to prevent.

Accordingly, I would find the violation as alleged in the complaint.

[1] In sec. II, par. 4, the judge inadvertently stated that on March 23, 1988, Rick Torres noticed that Larry DePeal had been at the union hall ''for the entire morning.'' Torres actually saw DePeal at the union hall for 35 to 40 minutes.

[2] We agree with the judge's finding that the Respondent did not act unlawfully in processing the internal charge filed by George Sloane against Rick Torres. No trial on the charge was ever conducted. Instead, when the Respondent's trial board initially met, it postponed the proceedings with the consent of Torres and Sloane. The Respondent then sought to ascertain whether a foreman could be tried. When the trial board again met on the charge it asked whether Sloane and Torres agreed that Torres was a foreman or superintendent when the events occurred. After receiving affirmative responses the trial board immediately dismissed the charges stating that a foreman could not be brought before it. In these circumstances we cannot agree with our dissenting colleague's conclusion that the Respondent's processing of the charge constituted unlawful harassment.

[1] See *Cement Workers D-357 (Southwestern Portland Cement)*, 288 NLRB 1156, 1157 (1988).

*James C. Sand, Esq.*, for the General Counsel.
*Helene M. Antel, Esq.*, of Anchorage, Alaska, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Anchorage, Alaska, on October 31, 1989. On June 27, 1989, Rick Torres filed the original charge alleging that International Brotherhood of Electrical Workers, Local Union No. 1547, AFL–CIO (Respondent or the Union) committed certain violations of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). Torres filed an amended charge against Respondent on August 4, 1989. On August 7, the Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that the Union violated Section 8(b)(1)(B) of the Act by imposing internal discipline on Torres. The complaint, further alleged, in the alternative that Respondent violated Section 8(b)(1)(A) of the Act by disciplining Torres. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs.[1] On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Redi Electric, Inc. (Redi) is an Alaskan corporation, with an office and place of business in Anchorage, Alaska, where it has been engaged in the construction industry as an electrical contractor. Redi has been engaged in the business of supplying day laborers for the city of Anchorage Municipal Light and Power Company at Anchorage, Alaska. During the 12 months prior to issuance of the complaint, Redi provided services valued in excess of $50,000 directly to the city of Anchorage which was itself engaged in interstate commerce by other than indirect means. Accordingly, Respondent ad-

[1] Briefs were received from the General Counsel and the Union on December 26, 1989.

mits and I find that Redi is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that at all times material Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*

Torres has worked as a foreman for several employers signatory to collective-bargaining agreements with Respondent over the past 5 or 6 years. For 4 years prior to the instant dispute, Torres had directed the work of day labor crews, as a foreman for the private company holding the contract, for the city of Anchorage's Municipal Light and Power Company (ML&P). Redi was the third electrical contractor providing day labor to ML&P that employed Torres as a supervisor. ML&P had actually required the hiring of Torres as a condition of the granting of the day labor contract to Redi.

Torres was the top man in the field for Redi and its principal contact person with ML&P. The Union had a collective-bargaining agreement with Redi covering the company's employees, including those working under the day labor contract.[2] Torres directed the work of the day labor crews for ML&P; crews ranging in size from 3 to 40 workers. While employed by Redi, Torres administered the collective-bargaining agreement for the day labor by using the Union's hiring hall, assigning overtime, and laying off and terminating employees. He was also responsible for the safety provisions of the agreement. Torres appointed and directed the other foremen on the job and was the Union's first contact for employee complaints or grievances.

In January 1988 the work under the day labor contract had slowed down to where Torres no longer had any employees to supervise. Torres quit his position with Redi and applied at the Union's hiring hall for work as a foreman and also as a rank-and-file electrician. However, Torres expected that a day labor contract would be let out in the spring of 1988. Torres expected to return as foreman for Redi or whoever was the successful bidder. Due to an economic downturn the contract was not let out for bid in the spring.

On March 23, 1988, Torres visited the Union's hiring hall. On that date he noticed that Larry DePeal, an employee of ML&P and a union shop steward, had been at the union hall for the entire morning. Thereafter, Torres went to the offices of ML&P to meet his wife for lunch. While waiting for his wife to take her lunchbreak, Torres had a conversation with Richard Warner of ML&P. Warner was the ML&P official responsible for the day labor contract and had worked closely with Torres for several years. It was Warner who had required Redi to employ Torres as its general foreman for the day labor contract. Further, Warner and Torres were personal friends. After some casual conversation, Torres mentioned to Warner that he had observed that ML&P's steward had spent the morning at the union hall. Warner, who had been unsuccessfully attempting to locate DePeal, questioned Torres further. Warner, believing DePeal had been conducting personal or union business on companytime, asked Torres to give him a written statement of what he had observed that morning. Warner intended to use the statement to support disciplining DePeal. Although the matter was later grieved, contrary to the allegations of the complaint, no grievance was pending at the time Torres gave this written statement.

As Union Steward DePeal had actively opposed ML&P's bidding the contract for day labor on the ground that it posed a threat to the job opportunities of ML&P's bargaining unit employees. Thus, Torres was not exactly a neutral in the dispute between ML&P and DePeal. Upon learning of Torres' report to Warner, DePeal filed intraunion charges against Torres. A trial board found Torres guilty and assessed a fine. Torres appealed the fine but his appeals were rejected.

In the early summer of 1989 Torres was again working as a supervisory foreman for Redi. Torres terminated an employee named Sloane and refused to accept a referral from the union hiring hall for an employee named Harry Warner. Both Sloane and Warner filed intraunion charges against Torres. The Union notified Torres of the charges against him and set the matters for a trial board hearing. One charge was dropped because Warner did not appear and the Sloane matter was postponed by agreement of Torres and Sloane. The trial board had requested a 30-day postponement in order to educate members of the trial board about the limitations on taking disciplinary action against supervisors. At the rescheduled trial board hearing, the trial board dismissed the charges against Torres prior to taking any testimony. The trial board obtained an admission from Sloane that Torres was indeed a supervisor and then notified the employee that the trial board could not take action against a supervisor. Sloane was told that he could only pursue a grievance under the collective-bargaining agreement.

The General Counsel argues that a union violates the Act as soon as it forwards the charges and convenes a trial board, even if no discipline is meted out. The Union argues that no violation should be found because the charges filed by Harry Warner were dismissed without any action by the Union and the Sloane charges were dismissed prior to the taking of testimony.

### B. *Analysis and Conclusions*

Section 8(b)(1)(B) of the Act provides that it shall be an unfair labor practice ''for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representative for the purpose of collective bargaining or the adjustment of grievances.'' The applicable principles of law are set forth in *Plumbers Local 364 (West Coast Contractors)*, 254 NLRB 1123, 1125 (1981):

> Section 8(b)(1)(B) prohibits both direct union pressure—for example, strikes—to force replacement of grievance representatives and indirect union pressure—for example, union discipline of supervisor-members—which may adversely effect the chosen supervisors' performance of their representative functions. *American Broadcasting Companies v. Writers Guild of America, West, Inc*., 437 U.S. 411 (1978); *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500, 502 (1969), enfd. 454 F.2d 1116 (10th Cir. 1972); and *Wisconsin River Valley District Council of United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Skippy Enterprises,*

[2] The Union also had a collective-bargaining agreement with ML&P covering ML&P's field employees. The ML&P bargaining unit was separate and apart from that supervised by Torres.

*Inc.)*, 218 NLRB 1063, 1064 (1975), enfd. 532 F.2d 47 (7th Cir. 1976).

> It is also well settled that union discipline of supervisor-members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B). In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance-adjustment services of his chosen representative. *American Broadcasting Companies, supra*, [437 U.S.] at 433–437 fn. 36; *NLRB v. International Union of Operating Engineers, Local Union No. 501, AFL–CIO*, 580 F.2d 359, 360 (9th Cir. 1978); *A. S. Horner, supra*, [177 NLRB] at 502; and *Skippy Enterprises, supra*, 218 NLRB 1064, enfd. 532 F.2d at 52–53. Such discipline is unlawful even where, as here, the supervisor defies the union and continues to work for the employer during the dispute; the discipline is unlawful because the supervisor, having been disciplined for working during a labor dispute, may reasonably fear further discipline and, hence, will be deterred from working during any future disputes. The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance-adjustment representative. *American Broadcasting Companies, supra*, [437 U.S. at] 433–437.

In *NLRB v. Electrical Workers IBEW Local 340 (Royal Electric)*, 481 U.S. 573 (1987), the United States Supreme Court held that a union, which fined supervisor-members for working for nonunion employers, did not violate Section 8(b)(1)(B), in part, because the supervisors did not have any authority to adjust grievances or to take any part in collective bargaining. The Court rejected the argument that all supervisors fall within the protection of Section 8(b)(1)(B). The Court held instead that Section 8(b)(1)(B) was intended only to prevent a union from impermissibly affecting the manner in which a supervisor-member might carry out his or her grievance-adjustment or negotiating duties. The purposes of Section 8(b)(1)(B) are to prevent unions from forcing employers into or out of multiemployer bargaining units and from dictating an employer's choice of representative for the settlement of grievances. It should be noted that while the section is intended to prevent a union's interference with the grievance adjuster's loyalty to the employer, it was intended to protect the employer, not the supervisor-member, from coercion. See *NLRB v. Electrical Workers IBEW Local 340*, supra, 481 U.S. 573.

Under *NLRB v. Electrical Workers IBEW Local 340*, the initial question to be addressed is whether Torres was an 8(b)(1)(B) representative. While employed by Redi, Torres administered the collective-bargaining agreement for this project by using the Union's hiring hall, assigning overtime, and laying off and terminating employees. He was also responsible for the safety provisions of the agreement. Torres directed the other supervisors on the job and was the Union's first contact for employee complaints or grievances. The Union does not dispute that Torres was an 8(b)(1)(B) representative of Redi while employed by that Employer. However, the Union contends that at the time of Torres' conduct, for which he was disciplined, Torres was not a grievance adjuster for Redi.

The Union contends that Torres was simply an employee or supervisor seeking work. The General Counsel argues that Redi had a reasonable expectation of returning as the day labor provider to the ML&P. Further the General Counsel argues that even if Redi did not successfully bid the day labor contract, Torres had a reasonable expectation of being hired as supervisor by any successful bidder. For the following reasons, I find the General Counsel's theories to be based on conjecture and speculation.

The Board has recognized that in the construction industry employees frequently work as supervisors or foremen and also as bargaining unit employees. The intermittent and short-term nature of construction work led to different treatment under Section 8(e) and (f) of the Act. *Electrical Workers IBEW Local 340 (Royal Electric)*, 271 NLRB 995, 1001 (1984). In this case at the time Torres engaged in the conduct for which he was fined, he was not employed as a supervisor but rather was an applicant for work at the hiring hall. Torres was seeking work at the hall as a foreman and also as a nonsupervisory electrician. Thus, at the critical time here, Torres was not an 8(b)(1)(B) representative for Redi as alleged in the complaint.

In rejecting the Board's contention that any supervisor was a potential 8(b)(1)(B) representative, the Supreme Court in the *NLRB v. Electrical Workers IBEW Local 340* case, supra, 481 U.S. 573, stated that the Board must make a factual inquiry whether a union's sanction may adversely affect the employer representative's performance of collective-bargaining or grievance-adjusting duties before an 8(b)(1)(B) violation can be found. ''One simply cannot discern whether discipline will have an adverse impact on a supervisor-member's future performance of Section 8(b)(1)(B) duties when their existence is purely hypothetical.'' Applying those principles to the instant case, Torres' discipline for conduct engaged in while an applicant for employment cannot be found to adversely effect on the performance of 8(b)(1)(B) duties.

Even assuming that Torres had a reasonable expectation of returning as a supervisor for Redi, the conduct for which he was fined was not performed for Redi or related to his employment with Redi. Torres volunteered information about an employee of ML&P, not Redi, to a supervisor of ML&P. This was not connected to any business of Redi. This conduct may have been in Torres' interest, as it may have created some goodwill with ML&P, but it did not relate in any way to Redi's business. It certainly did not relate to the collective-bargaining or grievance-adjustment activities of Redi. Unquestionably, Torres was not fined for performing grievance-adjusting or collective-bargaining duties. I cannot see how this union discipline would adversely affect his performance for Redi. More important, I can find no way in which Redi was coerced by this discipline.

The General Counsel, realizing the weakness of a case based on coercion of Redi, argues for the first time in his brief that Torres was jointly employed by ML&P and that he was acting as an 8(b)(1)(B) representative of ML&P when he was disciplined by the Union. Such a serious departure from the complaint should not be raised at such a late date. *Camay*

*Drilling Co*., 254 NLRB 239, 240 (1981). The matter was not fully litigated. Had the Union been put on notice of that contention, it could have produced evidence to the contrary or proffered evidence to show that ML&P was not an employer within the meaning of Section 2(2) of the Act. Accordingly, I will not address this argument in my decision.

The General Counsel argues that, in the alternative, if Torres was not an 8(b)(1)(B) representative, then as an applicant for employment of the hiring hall he should be protected under Section 8(b)(1)(A).

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union ''to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 of the Act.'' The proviso to Section 8(b)(1)(A) provides that the section ''shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.''

In *Scofield v. NLRB*, 394 U.S. 423 (1969), the United States Supreme Court stated at 430: ''Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy congress has imbedded in the labor laws, and reasonably enforced against union members who are free to leave the union and escape the rule.''

In *Cement Workers D-357 (Southwestern Portland Cement)*, 288 NLRB 1156 (1988), an employee was asked to sign a statement covering an incident to which he had been a witness. No grievance or disciplinary action was yet pending, although the employee was told that his fellow employee would be disciplined and that the employee's statement would be used to defend any grievance filed over the discipline. The Board found that by giving the statement under these circumstances the employee was cooperating with the grievance procedure and protected by Section 7 of the Act.

In *Teamsters Local 379 (J. H. McNamara)*, 284 NLRB 1413 (1987), the Board found a violation where an employee reported that another worker was sleeping in his truck at the beginning of the day. Later, the employee took pictures and told the employer that he had such pictures. The employee, although not a statutory supervisor, as assistant plant manager, was required to cooperate with the plant manager and support the accuracy of reports such as the one concerning a sleeping employee. The Board found that this activity was a part of the grievance procedure which would inevitably follow from the discipline which was sure to occur.

However, in *Transit Union Local 1225 (Greyhound Lines)*, 285 NLRB 1051 (1987), the Board reaffirmed the principle that the prohibitions of Section 8(b)(1)(A) apply where the informing employee's work duties required him or her to report the offending fellow employee to the employer. In such instances the informing employee would be required to put his or her job status in jeopardy by complying with a union rule prohibiting the reporting of a fellow employee. However, the distinction was made that where an employee initiated in a voluntary way reports to management, a union could enforce its rules against informing against a fellow member, in the interest of promoting union harmony. See *Communications Workers Local 5795 (Western Electric)*, 192 NLRB 556 (1971).

In the instant case, Torres was not even an employee of ML&P. He initiated in an entirely voluntary way the report to ML&P's management concerning fellow union-member DePeal. Torres was not compelled by any work rule or job duty to generate this report. Torres' report to Richard Warner was the first information ML&P had of DePeal's alleged misconduct. Accordingly, I find that the case is controlled by *Greyhound Lines*, supra. I, therefore, shall recommend that this allegation of the complaint be dismissed.

While employed by Redi in 1989, Torres was a supervisor within the meaning of Section 8(b)(1)(B) and the *Electrical Workers IBEW Local 340* case. The charges filed by Warner and Sloane related to the conduct of Torres in his supervisory position. Union discipline of Torres for such conduct would clearly restrain and coerce Redi in the selection and retention of its grievance-adjustment representatives. The question presented is whether Respondent can be found in violation of the Act by entertaining intraunion charges against such a supervisor where no disciplinary action was taken.

Citing *Cement Workers D-357*, supra, 288 NLRB 1156, the General Counsel argues that a union violates the law as soon as it forwards the charges and convenes a trial board, even if no discipline is ultimately meted out. There the Board specifically found that the union violated the Act once its preliminary inquiry disclosed, or should have disclosed, the protected nature of the activity, and found that proceeding to a hearing, despite the requirement to do so in its internal rules, was an unfair labor practice. However, in that case the union held a preliminary hearing and a trial finding the employee guilty of violating its constitution. The Board found the respondent union did more than merely receive and investigate a charge filed by a member. By holding a trial after the union knew that the employee's report was protected by Section 7 of the Act and informing the employee that his conduct was ''reprehensible,'' the respondent union sent a coercively clear message of disapproval designed to inhibit any similar exercise of Section 7 rights by employee-members in the future.

The Union argues that because it merely accepted the charges and then dismissed them properly it should not be found in violation of the Act. I could find no cases in which a violation was found where a union accepted charges or held a hearing, without reference to other unlawful conduct. In *Teamsters Local 557 (Liberty Transfer)*, 218 NLRB 1117, 1121 (1975), the Board found it unnecessary to resolve the question of whether Local 557's action in noticing an employee's charge for hearing—standing alone and without reference to what followed—constituted an independent violation of Section 8(b)(1)(A) of the Act. Rather, the Board found that Local 557 violated the Act by subjecting the employee to internal discipline because he gave testimony adverse to the local's position in a grievance proceeding, by impressing on the employee at the hearing that his conduct was inconsistent with his obligations as a union member, and by threatening the employee with discipline should he in the future testify for the employer against a fellow union member.

In the instant case, the Respondent dismissed the charges filed by Harry Warner because Warner did not appear at the scheduled trial. There was no exercise of Section 7 rights involved and no attempt to inhibit Torres' future conduct. With respect to the charges filed by Sloane, Respondent obtained the agreement of Sloane and Torres to postpone the trial. After educating the trial board members to the restrictions

against disciplining statutory supervisors, the trial board sought to establish whether there was any contention that Torres was not a supervisor. After Sloane conceded that Torres was a supervisor, no trial was held. Rather, the trial board informed Sloane that it couldn't entertain the charge and that the exclusive remedy was through the contract grievance procedure. Again, there was no exercise of Section 7 rights involved and no attempt to inhibit Torres' future actions as a supervisor or foreman. Under these circumstances, I do not find that the Union's acceptance of the charges and convening of the trial board amounted to restraint and coercion of Redi Electric within the meaning of Section 8(b)(1)(B) of the Act. The Union's actions appear reasonable and tend to discourage rather than encourage further charges against Torres by disgruntled employees. Therefore, I shall recommend that these allegations of the complaint be dismissed.

## CONCLUSIONS OF LAW

1. The Employer, Redi Electric, Inc., is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, International Brotherhood of Electrical Workers, Local Union No. 1547, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove that Respondent has violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

## ORDER

The complaint is dismissed in its entirety.

[3] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.